Supreme Court, U.S.
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No. 87-1842

In The

Supreme Court of the United States

October Term, 1987

JOHN L. KALTSAS, et al.,

Appellants,

v.

CITY OF NORTH CHICAGO, et al.,

Appellees.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS FOR THE SECOND DISTRICT

BRIEF OPPOSING MOTION TO DISMISS

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BRIEF OPPOSING MOTION TO DISMISS

The argument that Appellees advance to support their Motion to Dismiss has three basic elements. First, they claim that State authority governing municipal incorporation is not subject to the protections set forth in the Fourteenth Amendment of the United States Constitution. This argument is repugnant to the notion that the United States Constitution is the supreme law of the land. *See* U.S. Const. art. VI. Second, they claim that this case does not involve voting rights. This argument is contrary to established precedent. Third, the Appellees argue that the municipal consent provision of Ill. Rev. Stat. ch. 24, ¶2-3-5a, which applies to unincorporated areas with a population of 2,500 to 7,500 but not to unincorporated areas with a population over 7,500, is necessary to advance a compelling state interest. This argument, however, fails in light of other principles in the law of Illinois governing municipalities. As Appellants explain more fully below, this Court should deny Appellees' Motion to Dismiss.

I.
STATE AUTHORITY IS NOT ABSOLUTE.

In *Gomillion v. Lightfoot*, 364 U.S. 339, 344-45 (1960), this Court held that "[l]egislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution." Appellees, however, cling tenaciously to the notion that this Court's decision in *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907), automatically insulates any State legislation governing municipal incorporation from the United States Constitution. This Court explained in *Gomillion*, 364 U.S. at 342-44, that such a broad interpretation misconceives the reach of *Hunter*. In many instances, discussed *infra*, this Court and other courts have invalidated state laws governing municipal affairs for violating the Fourteenth Amendment.

Appellees also misstate the law in asserting that the *only* exception to the rule they purport to descend from *Hunter* is the racial discrimination this Court faced in

Gomillion v. Lightfoot. Appellees fail to address decisions of this Court and other courts which do not involve racial discrimination and which hold that the exercise of State power over municipal affairs must conform to the United States Constitution. *See, e.g., Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Cipriano v. City of Houma*, 395 U.S. 701 (1969). These include decisions invalidating statutes governing changes in municipal boundaries through incorporation or annexation. *See Hayward v. Clay*, 573 F.2d 187 (4th Cir. 1978) (annexation); *Curtis v. Board of Supervisors of Los Angeles County*, 7 Cal.3d 942, 104 Cal. Rptr. 297, 501 P.2d 537 (1972) (incorporation); *City of Seattle v. State*, 103 Wash.2d 663, 694 P.2d 641 (1985) (annexation); *Mayor and Council of City of Dover v. Kelley*, 327 A.2d 748 (Del. 1974) (annexation). Appellees' claim that State authority in this area is supreme therefore is erroneous and should not be a basis for dismissing this appeal.[1]

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[1] To support their position, Appellees cite two decisions from Illinois courts for the premise that Illinois courts have consistently followed the principle which Appellees purport to descend from *Hunter v. City of Pittsburgh*. *See* Motion to Dismiss at 2-3. However, the language they quote from *Spaulding School District v. City of Waukegan*, 18 Ill.2d 526, 165 N.E.2d 283, 285 (1960), is out of context. The court in that case was explaining that its role was merely to construe a statute adopted by the legislature; no constitutional questions were raised or decided. The decision does not even mention *Hunter* or any other decision of this Court. In *People ex rel. Landwer v. Village of North Barrington*, the court recognized that the legislature could not use "its power over municipal boundaries to circumvent a Federally-protected right, *such as* . . . the case in *Gomillion*". 94 Ill. App. 2d 265, 237 N.E.2d 350, 353 (1968) (emphasis added). The decision creates no impression that racial discrimination is the only exception to *Hunter*. Nor did *Landwer* involve a denial of voting rights or equal protection. It is therefore apparent that the courts of Illinois have never applied *Hunter* in the manner Appellees claim.

II.
THIS CASE INVOLVES A FUNDAMENTAL RIGHT TO VOTE.

Appellees' Motion to Dismiss erroneously tries to restrict constitutional protection of voting rights to cases where a right to vote for candidates is involved. *See* Motion to Dismiss at 6-7. Appellees fail to address numerous cases, which did not involve voting for candidates, in which this Court and other courts have recognized a constitutionally-protected right to vote on other municipal matters. *See, e.g., Cipriano v. City of Houma*, 395 U.S. 701 (1969) (revenue bond question); *Hill v. Stone*, 421 U.S. 289 (1975) (general obligation bond question). *See also St. Louis County, Mo. v. City of Town and Country*, 590 F. Supp. 731, 736 (E.D. Mo. 1984) (recognizing annexation voting rights claims as justiciable).

Established precedent recognizes and protects a right to vote on municipal boundary questions. Once the legislature places the final decision on incorporation or annexation in the hands of the voters in the unincorporated area, those persons have a right to vote which is protected by the constitutional principles governing elections. *Mayor and Council of City of Dover v. Kelley*, 327 A.2d at 754; *Curtis v. Board of Supervisors*, 501 P.2d at 545; *Hayward v. Clay*, 573 F.2d at 188-90; *City of Seattle v. State of Washington*, 694 P.2d at 646-47. In all of these cases, the courts found that voting rights existed and held that the impediments which the statutes placed on the exercise of those rights were repugnant to the Fourteenth Amendment.[2]

The Illinois legislature has created a right to vote for incorporation. The Municipal Code provides that villages

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[2] This Court itself has applied such principles. For example, in *Hadley v. Junior College District*, 397 U.S. 50, 59 (1970), this Court applied the "one-man, one-vote" rule to an elected school board and invalidated a statutory formula for selecting college trustees, even though in a prior case, *Sailors v. Board of Education*, 387 U.S. 105, 108 (1967), it recognized that school boards need not be elected.

may only be incorporated by election, and that such an election is the final decision regarding whether the area will be incorporated. Ill. Rev. Stat. ch. 24, ¶2-3-6 (1985). *See* Jurisdictional Statement at 11 n.2. The legislature has therefore granted to residents of unincorporated areas the right to vote on incorporation.[3] As in *Curtis, Hayward,* and *City of Seattle,* the Illinois statute allows someone else, the officials of nearby municipalities, to block such an election. In *Hayward v. Clay,* the Equal Protection Clause protected the right of residents of unincorporated areas to vote on annexation (that is, whether to incorporate an unincorporated area into an existing municipality) unburdened by a "condition precedent", 573 F.2d at 189, that property owners consent to the annexation. In the present case, Appellants seek to establish that the Fourteenth Amendment protects their right to vote on incorporation unburdened by a condition precedent that nearby municipalities consent to the incorporation.

The only case which Appellees cite to support their contention that voting rights are not at stake in the present case is *Holt Civic Club v. City of Tuscaloosa,* 439 U.S. 60 (1978), which is inapposite. In *Holt Civic Club,* 439 U.S. at 70, this Court found that no right to vote for municipal officials existed, and therefore judged the statute against the less-stringent "rational relationship" test. That decision did not address a situation where the right to vote for municipal incorporation was burdened for residents of some unincorporated areas but not for residents of

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[3] Because the Illinois legislature has provided for elections as the only way to incorporate a village, the present case is different from the situations addressed in *Carlyn v. City of Akron,* 726 F.2d 287 (6th Cir. 1984), *Goodyear Farms v. City of Avondale,* 148 Ariz. 216, 714 P.2d 386, *appeal dismissed* 447 U.S. 906 (1986), and *Berry v. Bourne,* 588 F.2d 422 (4th Cir. 1978). In each of these cases, the statutes at issue placed the final decision in the hands of a body other than the voters in the unincorporated area, and did not rely on elections to make the decisions.

other unincorporated areas. The issue was whether residents of *any* unincorporated area located within a municipality's extraterritorial jurisdiction had the right to vote for the municipality's officials. The Court held that no voting right existed in such a situation because the persons who wanted to vote were not "physically resident within the geographic boundaries of the government entity concerned." 439 U.S. at 68. In the present case, the entity concerned is the unincorporated area which Appellants seek to incorporate, within which Appellants *are* physically resident. Appellants do not seek to vote for the officials of the municipalities, who are not residents of the area concerned but who can refuse to consent to the incorporation. Rather, Appellants wish to exercise their right to hold an election on whether to incorporate a new village, with their own elected officials to govern their own affairs, to the same extent that residents of unincorporated areas with larger populations may hold such an election.

Established precedent recognizes that once the State legislature grants a right to vote on some matter, the United States Constitution prohibits the State from placing discriminatory burdens on that right, unless necessary to further a compelling state interest. Nevertheless, the court below ignored this precedent and held that this case involves no infringement of a fundamental right. Because the decision below directly conflicts with relevant precedent, appeal to this Court is warranted to determine whether the Fourteenth Amendment recognizes and protects Appellants' right to vote for incorporation to the same extent as residents of more-populated unincorporated areas in Illinois.

III.
THE MUNICIPAL CONSENT PROVISION IS NOT NECESSARY TO ADVANCE A COMPELLING STATE INTEREST.

In the court below, Appellees proffered only an interest the State may have in ensuring that an area proposed for incorporation has the fiscal capacity to provide services. *See Kaltsas v. City of North Chicago*, 160 Ill. App. 3d

302, 513 N.E.2d 438, 441 (1987).[4] Appellees now claim that the consent provision helps existing municipalities retain some measure of control over development outside their boundaries. A number of principles in the law of Illinois, however, demonstrate that a municipality's interest in development beyond its borders is not compelling enough to justify discriminatory infringement of fundamental voting rights, and that the consent provision is not necessary to advance this interest.[5]

First, the consent provision does not apply to *all* unincorporated areas within one and one-half miles of an existing municipality. Development in unincorporated areas with populations greater than 7,500, given the number of people involved, could be expected to have an even greater impact on nearby municipalities than development in unincorporated areas with populations between 2,500 and 7,500. However, the consent provision

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[4] Appellants addressed this interest at pages 23 to 26 of the Jurisdictional Statement.

[5] Appellees erroneously claim that the decision in *Town of Godfrey v. City of Alton*, 33 Ill. App. 3d 978, 338 N.E.2d 890 (1975), demonstrates that a municipality's interest in planning for development beyond its borders is a compelling state interest necessitating the municipal consent provision in Section 2-3-5a. In that decision, however, the court did not have before it an equal protection or due process claim. Its ruling addressed the questions of separation of powers and privileges and immunities, and therefore lacks precedential value in determining whether a particular government interest is compelling enough to justify infringement of a federally-protected right. *See McNellis v. Combustion Engineers, Inc.*, 13 Ill. App. 3d 733, 301 N.E.2d 96, 100 (1973) (decision sustaining constitutionality of statute is not decisive of its validity against subsequent attacks on different grounds). The court did not determine whether a municipality's interest in promoting uniform development and perpetuating its existing plans and regulations for the development of areas outside its boundaries are so compelling as to justify infringement of the voting rights of persons living in the unincorporated area.

does not apply to unincorporated areas with larger populations. If the legislature views the interest municipalities have in development outside their boundaries as compelling and the consent provision as necessary to advance such an interest, then it would apply that provision across the board.

Second, the consent provision applies to *any* municipality within one and one-half miles of the area seeking to incorporate, and not only to those municipalities which have planning jurisdiction over the area. Illinois grants such jurisdiction only over *contiguous* unincorporated areas within one and one-half miles of the municipal boundaries. Ill. Rev. Stat. ch. 24, ¶11-12-5(1) (1985). Section 2-3-5a contains no such contiguity requirement. It therefore grants a veto power over the election to municipalities that are not contiguous to the area to be incorporated, have no planning jurisdiction over the unincorporated area, and therefore have no such interest to protect in blocking incorporation of the area.[6]

Third, Illinois law precludes a municipality from blocking, in the interest of retaining extraterritorial jurisdiction, the annexation of adjacent unincorporated lands by another municipality. A *quo warranto* action is the only method of attacking the validity of an annexation in Illinois. *Schallau v. City of Northlake,* 82 Ill. App. 3d 456, 403 N.E.2d 266, 271 (1980). A municipality cannot bring a *quo warranto* action challenging an annexation by another municipality where its interest is limited to planning and zoning for adjacent territory outside of its boundaries. *People ex rel. Brooks v. Village of Lisle,* 24 Ill. App. 2d 432, 321 N.E.2d 65, 68 (1974). Annexation results in the incorporation of an unincorporated area and has the same consequences for another municipality as the basic incorporation of the area into its own municipality.

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[6] Such is the case with Appellee Village of Libertyville, which is physically separated by Appellees Village of Mettawa and Village of Green Oaks from the area Appellants seek to incorporate. *See* Appendix (Exhibit B to Complaint).

The result is the removal of the unincorporated area from the extraterritorial planning jurisdiction of the other municipality. *See* Ill. Rev. Stat. ch. 24, ¶11-12-5(1) (1985). Illinois law therefore does not recognize any interest the other municipality may have in the development of nearby unincorporated lands as compelling enough to block annexation or incorporation of those lands.

Fourth, the fact that the legislature has chosen to grant none of the Appellees zoning authority over the lands which Appellants seek to incorporate further indicates that Appellees have no compelling interest in planning for development outside their boundaries. Illinois does not grant municipalities the power to zone unincorporated lands where the County has a zoning ordinance applying to those lands. Ill. Rev. Stat. ch. 24, ¶11-13-1 (1985). The zoning ordinance of Lake County, Illinois, applies to all unincorporated lands in the County and, therefore, to the lands Appellants seek to incorporate. County of Lake, Ill., Lake County Zoning Ordinance art. II (1984).

Fifth, any concern Appellees may have for coordinated development of the area is adequately covered by another provision of the Municipal Code, which requires the County board to determine whether "the proposed incorporation is compatible with the official plan of development of the county". *See* Ill. Rev. Stat. ch. 24, ¶2-3-18 (1985). Lake County, which contains the area Appellants seek to incorporate, has a population of 451,594. Bureau of Census, U.S. Dep't of Commerce, Series P-26, No. 82-13-SC, *Local Population Estimates* (1984). The County therefore has authority to adopt an official plan and establish design standards for subdivisions, public streets, and other land improvements. Ill. Rev. Stat. ch. 34, ¶3006 (1985). In preparing such a plan, the County must encourage municipalities to cooperate in order to coordinate municipal plans with County plans. Ill. Rev. Stat. ch. 34, ¶3005 (1985). Because the County has its own plan which is coordinated with municipal plans for the area, the determination to be made by the County board under Section 2-3-18 suffices

to protect a nearby municipality's interest in coordinated development in unincorporated areas.

Finally, if an existing municipality is harmed by the land use decisions made by a new municipality located within its former extraterritorial planning jurisdiction, then Illinois law gives the existing municipality standing to challenge such decisions made by the new municipality. *See Village of Barrington Hills v. Village of Hoffman Estates*, 81 Ill.2d 392, 410 N.E.2d 37 (1980). Because there exists an alternative means of protecting an existing municipality's interest in land use decisions for territory outside its boundaries, the consent provision is not necessary to protect that interest.

All of the above factors show that the interest alleged by Appellees is not compelling, and that the municipal consent provision is not necessary to advance such an interest. Even if this Court were to find that the Appellants have no right to vote for incorporation, and therefore judged the municipal consent provision according to the "reasonable relationship" test for equal protection and due process, the above factors indicate that the consent provision does not meet even the lower level of scrutiny. Granting appeal of this case therefore is warranted.

IV.
CONCLUSION

Appellees show no respect for the United States Constitution. At the conclusion of their Motion to Dismiss, Appellees state that "the Constitution does not require the states to take one particular approach and there is no need for a federal solution to this problem." Motion to Dismiss at 8. The Fourteenth Amendment of the Constitution, however, does require the states to take a particular approach; that approach is to not deny due process and equal protection under the law. Because it burdens the right to vote of residents of some unincorporated areas but not the right of residents of other unincorporated areas, the municipal consent provision of Section 2-3-5a,

as it has been exercised by Appellees, violates the Fourteenth Amendment. Because the decision below implicates a fundamental right and contradicts relevant decisions by this Court and other courts, a substantial federal question exists and Appellants respectfully request this Court to deny Appellees' Motion to Dismiss and note probable jurisdiction of this appeal.

Respectfully submitted,

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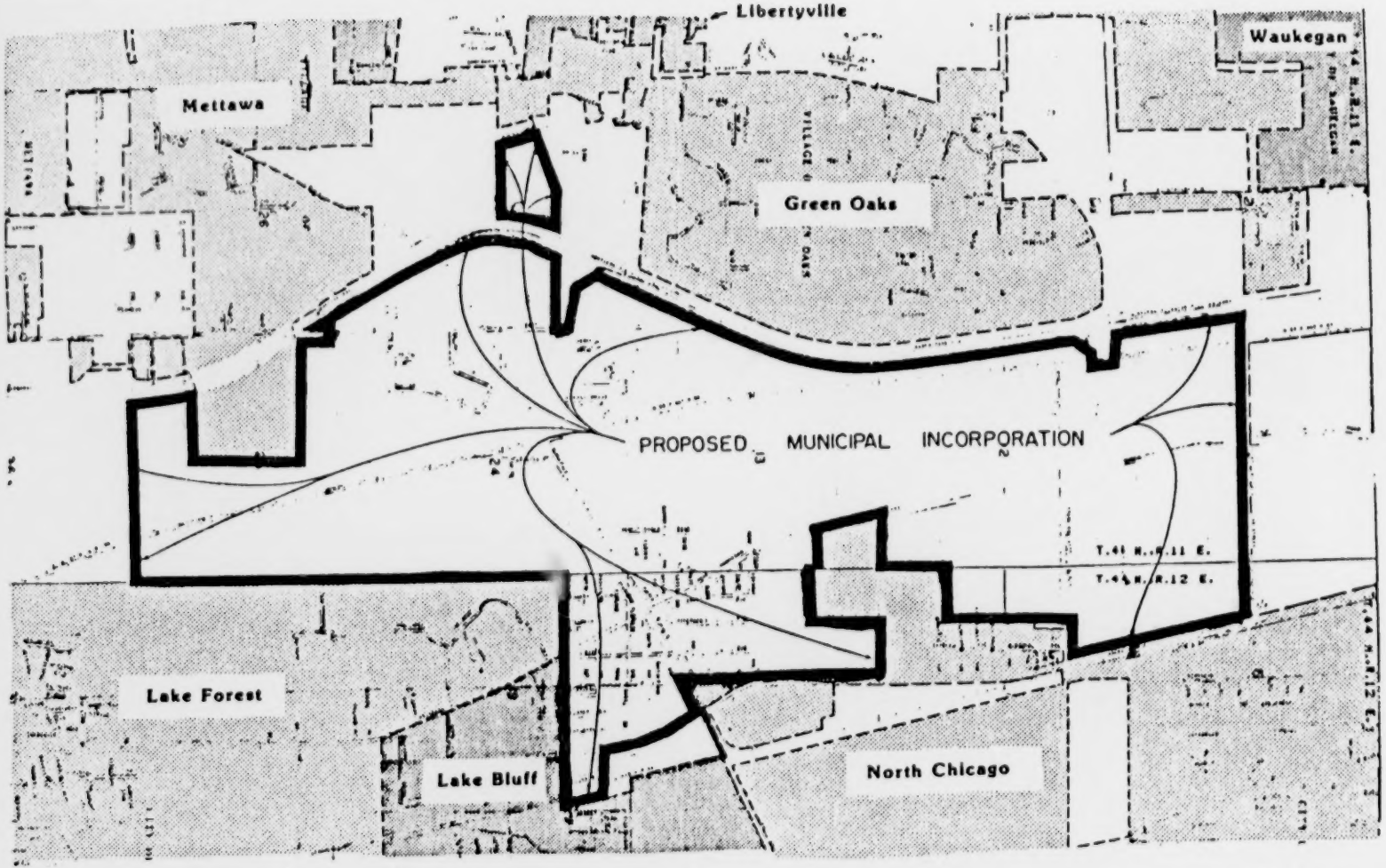
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Exhibit B